French Law is NOT a Model for the Polish Bill on Disciplining Judges

Sébastien Platon 2020-01-17T16:16:56

We, French legal academics and experts in French Law, reject the instrumentalization of French Law by the Polish Government

On 13 December 2019, the Polish ruling party, PiS ("Law & Justice"), introduced a bill on disciplining judges, officially called Bill of Amendment of the Law on the System of Common Courts, the Act on the Supreme Court, and Some Other Acts (here in Polish). This bill, passed by the Polish *Sejm* on 20 December 2019 and now under deliberation in the Senate, has been criticised at "[aiming] at preventing judges from applying EU law to challenge previous judicial 'reforms' as well as from criticizing these reforms at all". Among other provisions, in its final version the bill introduces disciplinary liability for judges (1) engaging in any activities hindering the functioning of the judicial system, as well as (2) questioning the validity of judicial appointments or legitimacy of state constitutional bodies. In an Urgent Interim Opinion issued on the 14th January 2020, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) stated that these provisions, insofar as they preclude any review or questioning of the status of any individual appointed by the President of the Republic to a judicial position or of any court, tribunal or other state body, are the ones that raise "the most significant concern" in that "these provisions undermine the core function of the court to adjudicate on disputes in an independent and impartial manner" (pp. 4-5). The judges are also to be liable for engaging in public activity contrary to the principle of judicial independence. As it has been observed, "whereas the provision sounds innocent, it is expected to be used against the judges who publicly protest the judicial 'reforms' introduced by Law & Justice". In an urgent Opinion issued on the 16th January 2020, the Council of Europe's Venice Commission, jointly with the Directorate General of Human Rights and Rule of Law, concludes that the Bill may further undermine judicial independence. This new Bill is another step in a methodical strategy aimed at curtailing the independence of the judiciary in Poland through a series of so-called judicial "reforms" that triggered various reactions from the European Union, both judicial and extra-judicial (see here and here for an up-to-date synthesis of the situation).

In order to justify this new "reform", senior officials of the Polish Government have repeatedly argued they were only following foreign practices. In particular, in several instances, French Law was mentioned. To give a few examples:

- On 19 December 2019, Sebastian Kaleta, Secretary of State at the Ministry of Justice, during a debate before the Sejm (the lower chamber of the Polish Parliament), said: "We have only five drafts for disciplinary torts, but in some countries, there are even several dozens of them. I start with France (…) I

will read you a sworn translation (…). First provision … The participation of members of the judiciary in political debates is prohibited. (…) The judges are forbidden from demonstrating hostility to the principles of operation or form of the republic's government (…), as well as to make any political statements that are incompatible with the restrictions related to their function. (…) Any joint actions that may prevent or hinder the functioning of the courts are also prohibited. This is a translation. Everyone can argue with it in terms of interpretation, but it seems to me that an average listener can understand what is meant by a ban on demonstrating hostility towards the government or a ban on participating in political debates" (https://www.sejm.gov.pl/Sejm9.nsf/stenogramy.xsp?rok=2019&fbclid=IwAR1qFdD8TuPFAiXGAXeCLtGx-htG9rzGp4HVAwBFPE5sGSD5cGjCjWlX6p4, p. 136-137);

- On the 22nd December 2019, Andrzej Duda, President of Poland, declared during an interview:
  "Legal solutions that are envisaged in countries in the Western Europe, in France for instance, which aim to strengthen the credibility of the court, to strengthen the sense of justice and impartiality of the court, because the judges do not, in principle, speak on political matters, they do not speak for any political grouping." (interview in TVP, 22 December 2019, https://www.youtube.com/watch?v=9H3ULB8NAXo)
- on the 23rd December 2019, Mateusz Morawiecki, Prime Minister, said: "I prepared a French statute. France is a developed and mature democracy, I will read the French Law Act on Judicial Statute to anyone who questions our changes" (https://wiadomosci.wp.pl/mateusz-morawiecki-broni-ustawy-cytuje-prawo-we-francji-6459836311991937a)

We, French legal academics and experts, must regret and protest against this misrepresentation and instrumentalization of French law.

First, it must be emphasised that the disciplinary proceedings against judges under French Law are designed to protect the independence of the Judiciary, which is constitutionally guaranteed and protected by the Constitutional Council. Disciplinary proceedings against judges in France are brought before the High Council for the Judiciary ("Conseil Supérieur de la Magistrature" – CSM), the existence, composition and functions of which are entrenched in Article 65 of the French Constitution. The section of the CSM that has jurisdiction over judges is presided over by the Chief President of the Court of Cassation and comprises, in addition, five judges and one public prosecutor, elected by their peers under the 1994 Organic Act on the CSM, one member of the Council of State appointed by it, one barrister appointed by the National Bar Council, as well as six "qualified, prominent citizens who are not members of Parliament, the Judiciary or the administration", appointed by the President of the Republic (2), the President of the National Assembly (2) and the President of the Senate (2). Every appointment of a judge must be approved by this Section of the CSM, the opinion of which is binding. Neither the magistrates who are elected by their peers nor the "prominent citizens" appointed by other constitutional institutions have a majority.

This stands in sharp contrast with the disciplinary proceedings in Poland since 2017. Disciplinary actions are to be brought before the Disciplinary Chamber of the Supreme Court. This new Chamber was created by the 2017 Polish Law on the Supreme Court. The Law also provides that, until the day on which all the posts in the Disciplinary Chamber have been filled for the first time, judges of the Supreme Court shall be appointed to the Disciplinary Chamber by the President of the Republic of Poland on the proposal of the National Council of the Judiciary (NCJ) – allowing the President to pack the Disciplinary Chamber in the meanwhile. On the same day, another Law was adopted that amended the way the members of the NCJ are appointed. Among the 25 members of the NCJ, the 15 who used to be elected by their peers are replaced, with immediate effect, by 15 members elected by the Sejm, and therefore by the ruling party, who enjoys an absolute majority there. This means that the NCJ is composed of a majority of 23 of 25 members coming from the legislative and executive authorities. This obviously raises important questions concerning the independence of this body vested with important powers over the Polish Judiciary, to the extent that, on the 17th September 2018, the General Assembly of the European Network of Judicial Councils decided to suspend its Polish member on the grounds that, as a result of the recent reforms in Poland, it was no longer independent. In its recent ruling in the *A.K.* case, the Court of justice of the European Union raised extremely serious doubts (to put it mildly) as regards the way the members of the NCJ are appointed, the way it exercises its constitutional responsibilities and the effectivity of the judicial review open against its resolutions. It also raised doubts as regards the Disciplinary Chamber itself. The Polish disciplinary system is currently the object of an infringement proceeding before the Court of Justice, and the European Commission has announced that it would apply for interim measures in this case.

Second, in the aforementioned declarations, the Polish Government is misrepresenting French substantive Law on the ethical duties of the Judiciary.

Article 10 of the Statutory Order of 22 December 1958 states that "any political discussion is prohibited in the judicial body as well as any display of hostility to the principle or the form of the Government of the Republic. Similarly, any demonstration of a political nature is incompatible with the restraint that the duties of judiciary members impose upon them". However, the Compendium of the Judiciary's Ethical Obligations, published in French, English and Spanish by the French CSM in 2010 and updated in 2019 clearly states that "in practice, only abusive or deliberately provocative comments as well as those likely to undermine the duty of impartiality by which judiciary members are bound are punishable" (p. 51). Judges are not prevented from having or expressing political views. For example, they "may freely join or commit to a political party" (p. 51). Article 10-1 of the statutory order guarantees the freedom of association of judiciary members who may freely form and join union organisations and hold office within them. In an opinion issued in 1987, the CSM explicitly stated that "the obligation of reserve cannot serve to reduce the magistrate to silence or conformism, but must be reconciled with the particular right to independence which fundamentally distinguishes the magistrate from the civil servants".

Maybe even more importantly in comparison with the Polish bill, which makes it disciplinary liable for judges to question the validity of judicial appointments or legitimacy of state constitutional bodies, it must be emphasised that the CSM Compendium, under its Chapter one dedicated to “Independence”, clearly states that “Members of the judiciary may not be prosecuted or liable for disciplinary action due to their court decisions” (p. 9).

The French system is not perfect. No system is. However, deliberately instrumentalising comparative Law and misrepresenting foreign legislations as a strategy to gaslight opponents in a clear effort to subjugate the Judiciary cannot stand uncorrected.

(More signatures may be added in comments below).

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